

**UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT  
AGENCY APPEAL PRE-ARGUMENT STATEMENT (FORM C-A)**

☒ APPLICATION FOR ENFORCEMENT

☐ PETITION FOR REVIEW

1. SEE NOTICE ON REVERSE.

2. PLEASE TYPE OR PRINT.

3. PAPERCLIP ANY ADDITIONAL PAGES

|   |  |   |   |  |  |                 |          |                |          |  |   |  |                |
|---|--|---|---|--|--|-----------------|----------|----------------|----------|--|---|--|----------------|
| CAPTION:<br><br>NATIONAL LABOR RELATIONS BOARD<br><br>v.<br><br>98 CRYSTAL PALACE RESTAURANT INC., D/B/A<br>GRAND HARMONY RESTAURANT  |  | AGENCY NAME:<br>National Labor Relations Board  |   | AGENCY NO.:<br>02-CA-160359  |  |                 |          |                |          |  |   |  |                |
|   |  | DATE THE ORDER UPON WHICH<br>REVIEW OR ENFORCEMENT IS<br>SOUGHT WAS ENTERED BELOW:<br><br>June 30, 2016 |   | ALIEN NO :<br>(Immigration Only)   |  |                 |          |                |          |  |   |  |                |
|   |  | DATE THE PETITION OR<br>APPLICATION WAS FILED:  |   | Is this a cross-petition for review /<br>cross-application for enforcement?<br><br><input type="checkbox"/> YES <input checked="" type="checkbox"/> NO |  |                 |          |                |          |  |   |  |                |
| <b>Contact<br/>Information<br/>for<br/>Petitioner(s)<br/>Attorney:</b>  | <table style="width:100%; border: none;"> <tr> <td style="width:25%;">Counsel's Name:</td> <td style="width:25%;">Address:</td> <td style="width:25%;">Telephone No.:</td> <td style="width:25%;">Fax No.:</td> </tr> <tr> <td>Linda Dreeben</td> <td>Nat'l Labor Relations Board<br/>1015 Half Street, S.E.<br/>Washington, D.C. 20570</td> <td>(202) 273-2960<br/><br/>E-mail: AppellateCourt@nlrb.gov</td> <td>(202) 273-0191</td> </tr> </table>                               |   |   |  |  | Counsel's Name: | Address: | Telephone No.: | Fax No.: | Linda Dreeben  | Nat'l Labor Relations Board<br>1015 Half Street, S.E.<br>Washington, D.C. 20570 | (202) 273-2960<br><br>E-mail: AppellateCourt@nlrb.gov    | (202) 273-0191 |
| Counsel's Name:   | Address:   | Telephone No.:  | Fax No.:  |  |  |                 |          |                |          |  |   |  |                |
| Linda Dreeben   | Nat'l Labor Relations Board<br>1015 Half Street, S.E.<br>Washington, D.C. 20570  | (202) 273-2960<br><br>E-mail: AppellateCourt@nlrb.gov   | (202) 273-0191  |  |  |                 |          |                |          |  |   |  |                |
| <b>Contact<br/>Information<br/>for<br/>Respondent(s)<br/>Attorney:</b>  | <table style="width:100%; border: none;"> <tr> <td style="width:25%;">Counsel's Name:</td> <td style="width:25%;">Address:</td> <td style="width:25%;">Telephone No.:</td> <td style="width:25%;">Fax No.:</td> </tr> <tr> <td>Carmelo Grimaldi,<br/>Meltzer, Lippe,<br/>Goldstein &amp;<br/>Breitstone, LLP</td> <td>190 Willis Avenue<br/>Mineola, NY 11501-2672</td> <td>(516) 470-0121<br/><br/>E-mail: cgrimaldi@meltzerlippe.com</td> <td>(516) 237-2893</td> </tr> </table> |   |   |  |  | Counsel's Name: | Address: | Telephone No.: | Fax No.: | Carmelo Grimaldi,<br>Meltzer, Lippe,<br>Goldstein &<br>Breitstone, LLP | 190 Willis Avenue<br>Mineola, NY 11501-2672                                     | (516) 470-0121<br><br>E-mail: cgrimaldi@meltzerlippe.com | (516) 237-2893 |
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| JURISDICTION<br>OF THE COURT<br>OF APPEALS<br>(provide U.S.C.<br>title and section):<br>29 USC § 160(e)   | APPROX. NUMBER<br>OF PAGES IN THE<br>RECORD:   | APPROX.<br>NUMBER OF<br>EXHIBITS IN<br>THE RECORD:  | Has this matter been before this Circuit previously? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No<br><br>If Yes, provide the following:<br><br>Case Name:<br><br>2d Cir. Docket No.:                      Reporter Citation: (i.e., F.3d or Fed. App.) |  |  |                 |          |                |          |  |   |  |                |
| <b>ADDENDUM "A": COUNSEL MUST ATTACH TO THIS FORM: (1) A BRIEF, BUT NOT PERFUNCTORY, DESCRIPTION OF THE NATURE OF THE ACTION; (2) THE RESULT BELOW; AND (3) A COPY OF ALL RELEVANT OPINIONS/ORDERS FORMING THE BASIS FOR THIS PETITION FOR REVIEW OR APPLICATION FOR ENFORCEMENT.</b> |  |   |   |  |  |                 |          |                |          |  |   |  |                |
| <b>ADDENDUM "B": COUNSEL MUST ATTACH TO THIS FORM: (1) THE RELIEF REQUESTED; (2) A LIST OF THE PROPOSED ISSUES; AND (3) THE APPLICABLE APPELLATE STANDARD OF REVIEW FOR EACH PROPOSED ISSUE.</b>  |  |   |   |  |  |                 |          |                |          |  |   |  |                |
| <b>PART A: STANDING AND VENUE</b>   |  |   |   |  |  |                 |          |                |          |  |   |  |                |
| <p align="center"><b><u>STANDING</u></b></p> PETITIONER / APPLICANT IS:<br><input checked="" type="checkbox"/> AGENCY <input type="checkbox"/> OTHER PARTY<br><input type="checkbox"/> NON-PARTY (SPECIFY STANDING):  |  |   | <p align="center"><b><u>VENUE</u></b></p> COUNSEL MUST PROVIDE IN THE SPACE BELOW THE FACTS OR<br>CIRCUMSTANCES UPON WHICH VENUE IS BASED:<br>Venue is proper because unfair labor practices occurred in New<br>York.   |  |  |                 |          |                |          |  |   |  |                |

**IMPORTANT. COMPLETE AND SIGN ON PAGE 2 OF THIS FORM.**

**PART B: NATURE OF ORDER UPON WHICH REVIEW OR ENFORCEMENT IS SOUGHT**  
(Check as many as apply)

**TYPE OF CASE:**

|  |   |
|--|---|
| _____ ADMINISTRATIVE REGULATION / RULEMAKING | _____ IMMIGRATION - <b>includes denial of an asylum claim</b>         |
| _____ BENEFITS REVIEW                        | _____ IMMIGRATION - <b>does not include denial of an asylum claim</b> |
| <u>X</u> _____ UNFAIR LABOR                  | _____ TARIFFS   |
| _____ HEALTH & SAFETY                        | _____ OTHER:<br>(SPECIFY) _____                                       |
| _____ COMMERCE                               |   |
| _____ COMMUNICATIONS                         |   |
| _____ ENERGY                                 |   |

1. Is any matter relative to this petition or application still pending below? ☐ Yes, specify: \_\_\_\_\_ ☒ No

2. To your knowledge, is there any case presently pending or about to be brought before this Court or another court or administrative agency which:

(A) Arises from substantially the same case or controversy as this petition or application ? ☐ Yes ☒ No

(B) Involves an issue that is substantially similar or related to an issue in this petition or application ? ☐ Yes ☒ No

If yes, state whether ☐ "A," or ☐ "B," or ☐ both are applicable, and provide in the spaces below the following information on the *other* action(s):

|                                  |            |           |                  |
|----------------------------------|------------|-----------|------------------|
| Case Name:                       | Docket No. | Citation: | Court or Agency: |
| Name of Petitioner or Applicant: |            |           |                  |

Date: September 30, 2016

Signature of Counsel of Record: /s/ Linda Dreeben

**NOTICE TO COUNSEL**

**Once you have filed your Petition for Review or Application for Enforcement, you have only ten (10) calendar days in which to complete the following important steps:**

1. Complete this Agency Appeal Pre-Argument Statement (Form C-A), serve it upon all parties, and file an original and one copy with the Clerk of the Second Circuit.
2. Pay the \$250 docketing fee to the Clerk of the Second Circuit, unless you are authorized to prosecute the appeal without payment.

**PLEASE NOTE: IF YOU DO NOT COMPLY WITH THESE REQUIREMENTS WITHIN TEN (10) CALENDAR DAYS, YOUR PETITION FOR REVIEW OR APPLICATION FOR ENFORCEMENT WILL BE DISMISSED. SEE THE CIVIL APPEALS MANAGEMENT PLAN OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.**

## **ADDENDUM “A”**

### **(1) A Brief Description of the Nature of the Action:**

This is an action to enforce an NRLB order. On December 30, 2015, a complaint was issued against 98 Crystal Palace Restaurant Inc., d/b/a Grand Harmony Restaurant (Respondent). A hearing was held before an administrative law judge and, on May 13, 2016, the judge issued a decision finding Respondent had violated the Act and recommended that an order be issued requiring Respondent to take actions to remedy the violations. The Board transferred the proceedings to itself and notified Respondent that the Board must receive exceptions to the administrative law judge's decision by June 10, 2016. Respondent did not file exceptions with the Board. In the absence of any exceptions, on June 30, 2016, the Board adopted the administrative law judge's findings and conclusions and directed Respondent to take the actions set forth in the administrative law judge's recommended order.

### **(2) The result below:**

The Board adopted the administrative law judge's findings and conclusions and directed Respondent to take the actions set forth in the administrative law judge's recommended order.

### **(3) Relevant Opinions and Orders:**

- Order of June 30, 2016, *98 Crystal Palace Restaurant Inc., d/b/a Grand Harmony Restaurant and 318 Restaurant Workers Union*

- Decision, Administrative Law Judge Raymond P. Green, May 13, 2016, *98 Crystal Palace Restaurant Inc., d/b/a Grand Harmony Restaurant and 318 Restaurant Workers Union*, Case No. 02-CA-160359 at JD(NY)-16-16

## **ADDENDUM “B”**

(1) Relief requested:

Enforcement of the June 30, 2016, Order of the National Labor Relations Board ordering that Respondent, 98 Crystal Palace Restaurant Inc., d/b/a Grand Harmony Restaurant, its officers, agents, successors, and assigns, to cease and desist and take certain affirmative actions designed to effectuate the policies of the Act including reimbursing specific employees.

(2) List of Proposed Issues:

Due to Respondent’s failure to file exceptions to the findings and conclusions of the administrative law judge, the Board is entitled to summary entry of a judgment enforcing its order.

(3) Applicable standard of review:

Section 10(e) of the Act (29 U.S.C. § 160(e)) provides that “no objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused by extraordinary circumstances.” This limitation is jurisdictional and its application is mandatory. *Woelke & Romero Framing v. NLRB*, 456 U.S. 645, 666-67 (1982). Interpreting this requirement, this Court and other circuits have consistently held that a respondent’s failure to file any exceptions before the Board entitles the Board, absent extraordinary circumstances, to summary entry of a judgment enforcing its order. *See, e.g., NLRB v. Ferguson Electric Co.*, 242 F.3d 426, 429 (2d Cir. 2001). *Accord, e.g., NLRB v. Tri-State Warehouse & Distrib.*, 677 F.2d 31, 31 (6th Cir. 1982); *NLRB v. Int’l Union of Operating Eng’rs, Local 86*, 357 F.2d 841, 846-47 (3d Cir. 1966); *NLRB v. Pugh & Barr, Inc.*, 194 F.2d 217, 218-21 (4th Cir. 1952).

New York, NY

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

98 CRYSTAL PALACE RESTAURANT INC.,  
D/B/A GRAND HARMONY RESTAURANT

Case 02-CA-160359

and

318 RESTAURANT WORKERS UNION

**ORDER**

On May 13, 2016, Administrative Law Judge Raymond P. Green of the National Labor Relations Board issued his decision in the above-entitled proceeding and, on the same date, the proceeding was transferred to and continued before the Board in Washington, D.C. The Administrative Law Judge found that the Respondent has engaged in certain unfair labor practices, and recommended that it take specific action to remedy such unfair labor practices.

No statement of exceptions having been filed with the Board, and the time allowed for such filing having expired,

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, and Section 102.48 of the National Labor Relations Board Rules and Regulations, the Board adopts the findings and conclusions of the Administrative Law Judge as contained in his decision, and orders that the Respondent, 98 Crystal Palace Restaurant Inc., d/b/a Grand Harmony Restaurant, its officers, agents, successors, and assigns, shall take the action set forth in the recommended Order of the Administrative Law Judge.

Dated, Washington, D.C., June 30, 2016.

By direction of the Board:

/s/Farah Z. Qureshi

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Associate Executive Secretary

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
NEW YORK BRANCH OFFICE**

**98 CRYSTAL PALACE RESTAURANT INC.,  
d/b/a GRAND HARMONY RESTAURANT**

**and**

**Case 02-CA-160359**

**318 RESTAURANT WORKERS UNION**

*Greg Davis Esq.*, Counsel for the  
General Counsel  
*Nelson Mar*, President of 318  
Restaurant Workers Union

**DECISION**

**STATEMENT OF THE CASE**

Raymond P. Green, Administrative Law Judge. I heard this case on April 18, 2016.<sup>1</sup> The charge and amended charge were filed on September 21 and 22, 2015.<sup>2</sup> The Complaint was issued on December 30, 2015, and alleged as follows:

1. That on April 14, 2014, the Board certified the Union as the representative of certain employees.
2. That on or about August 25, 2015, the Respondent closed its facility and terminated all of the bargaining unit employees.
3. That since October 9, 2015, the Respondent refused to respond to the Union's request to bargain over the effects of the closing.

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<sup>1</sup> Notwithstanding being served with the Complaint and the Notice of Hearing, the Respondent did not appear at the hearing.

<sup>2</sup> The original charge contained an incorrect address, (94 Mott Street), and was not served on the Respondent. Nevertheless on the following day, an amended charge was filed and this was served on the Respondent at its correct address, which was 98 Mott Street, New York, New York 10013. The envelope containing the amended charge was, however, returned to the Region stamped; "attempted—not known, unable to forward." Thereafter, the Union, by tracking the license plate of the owner's car, provided the Region with the residential address of the married owners of Respondent, Juan Na Chen and Wei Ping Chen. The amended charge was thereupon served at their residence located at 17 Lake Road, Great Neck, New York 11020. It is also noted that the Complaint was served on the Respondent's owners at their residence and at the restaurant's address at 98 Mott Street, and that its attorney filed an Answer on January 12, 2016.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

## **FINDINGS AND CONCLUSIONS**

### **I. JURISDICTION**

The Answer filed by counsel for the Respondent dated January 12, 2016 admits that the Respondent is a New York corporation that operated a public restaurant until August 25, 2015 at 98 Mott Street, New York, New York, 10013. The Answer also admitted paragraph 2(b) of the Complaint which alleged that in conducting its operations during the 12-month period ending August 25, 2015, the employer derived gross revenues in excess of \$500,000 and purchased goods valued in excess of \$5,000 that were produced and originated from outside the State of New York. Accordingly, based on the Board's standards for retail enterprises, I conclude that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I also find based on the testimony of Nelson Mar, the Union's president that 318 Restaurant Workers Union is an organization in which employees participate and that exists for the purpose of representing employees concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. I therefore conclude that it is a labor organization within the meaning of Section 2(5) of the Act.

### **II. THE ALLEGED UNFAIR LABOR PRACTICES**

Pursuant to a stipulated election agreement, the Union was certified as the exclusive collective-bargaining representative on April 14, 2015. The unit consisted of all full-time and regular part-time dining room employees, including waiters, bus persons, and dim sum sellers employed by Respondent at its facility located at 94 Mott Street, New York, New York, known as the Grand Harmony Restaurant. Despite a period of bargaining, the parties failed to reach a collective-bargaining agreement.

On or about August 25, 2015, the employees were unexpectedly notified that the restaurant was closed and that they should collect their wages. On August 31, 2015, the following notice was posted on the restaurant's window:

We'd like to express our appreciation to our customers for their support. Due to our lease coming to an end, the less than favorable economic conditions of the past few years, and several failed attempts at trying to continue the lease with our landlord, Good Harmony Restaurant will be closing its doors. We'd like to express our deepest apologies for any inconvenience and hope you understand.

The evidence shows that prior to the closing of the restaurant, the Union was not notified about the closing and was not given an opportunity to bargain about the effects of the closing.

On October 9, 2015, the Union sent letters to the restaurant at 98 Mott Street and to Wei Ping Chen at his residential address in Great Neck, New York. In these letters, the Union requested bargaining over the effects of the closure of the restaurant. The certified receipt shows that this letter was received at the Chen's home address in Great Neck.

The evidence also shows that upon receipt of the letter, an attorney representing the Respondent, (Michael Mule), left a voice mail message with the Union asking for legal authority

supporting the position that it had an obligation to bargain over the closing. This was followed up by an e-mail dated October 16, 2015, whereby Mule reiterated his request for legal authority.

On October 22, the Union's representative replied by e-mail and cited language from the Supreme Court's decision in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 682–683 (1981) ("bargaining over the effects of a decision must be conducted in a meaningful manner and at a meaningful time, and the Board may impose sanctions to insure its adequacy.")

The October 22 communication was the final one between the parties and at no time did the Respondent offer to bargain over the effects of its decision to close.

### ANALYSIS

I conclude that the amended charge was properly served on the Respondent when after its initial failure of delivery, it was served at the owner's home address in Great Neck, New York. Also, there is no question but that the Complaint was properly served and it is clear that sufficient notice was given as an attorney representing the Respondent filed a timely Answer to the Complaint.

Where there is a duly certified or recognized collective-bargaining representative, an employer, although not having an obligation to bargain about a decision to close its business, it nevertheless does have an obligation to bargain about the effects of that decision. *First National Maintenance*, 452 U.S. 666, 678 fn. 15 (1981).

In the present case, the evidence shows that the Respondent did not give the Union prior notice of its decision to close. And when the Union made a demand to bargain, it refused. Accordingly, it is clear that the Union was not given an opportunity to bargain about the effects of this decision and to this extent, I conclude that the Respondent violated Section 8(a)(5) and (1) of the Act.

### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

In accordance with the Board's decision in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), I shall recommend a limited backpay remedy designed to make whole the employees for those losses suffered as a result of the Respondent's failure to bargain in good faith.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended <sup>3</sup>

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<sup>3</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.



**ORDER**

The Respondent, 98 Crystal Palace Restaurant Inc., d/b/a Grand Harmony Restaurant, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Refusing to bargain with 318 Restaurant Workers Union about the effects of its decision to close the restaurant.

(b) In any like or related manner, interfering with, restraining or coercing employees in the rights guaranteed to them by Section 7 of the Act.

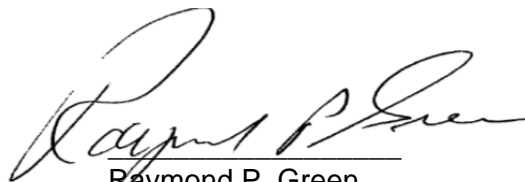
2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Upon request, bargain with the Union about the effects on its employees employed at 98 Mott Street, New York, New York, and to pay these employees amounts at the rate of their normal wages when last in the Respondent's employ from 5 days after the date of this Decision until the occurrence of the earliest of the following conditions:

(1) the date the Respondent bargains for agreement with the Union on those subjects pertaining to the effects of the closing; (2) a bona fide impasse in bargaining; (3) the failure of the Union to request bargaining within 5 days of this Decision, or to commence negotiations within 5 days of the Respondent's notice of its desire to bargain with the Union; or (4) the subsequent failure of the Union to bargain in good faith; but in no event shall the sum paid to any of these employees exceed the amount he would have earned as wages from August 25, 2015, the date on which the Respondent terminated its operations, to the time they secured equivalent employment elsewhere, or the date when the Respondent offers to bargain, whichever occurred sooner; provided, however, that in no event shall this sum be less than these employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ.

(b) As the employer has closed the facilities involved in these proceedings, the Employer shall duplicate and mail, at its own expense, a copy of the notice attached hereto as Exhibit A to all current employees and former employees employed by the Employer at any time since August 25, 2015.

Dated, Washington, D.C. May 13, 2016



Raymond P. Green  
Administrative Law Judge

**Appendix**

**NOTICE TO EMPLOYEES**

**Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government**

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

**WE WILL NOT** refuse to bargain with 318 Restaurant Workers Union about the effects of our decision to close the restaurant.

**WE WILL NOT** in any like or related manner interfere with, restrain or coerce our employees in the rights guaranteed by Section 7 of the Act.

**WE WILL**, upon request, bargain collectively with 318 Restaurant Workers Union with respect to the effects of our decision to close our restaurant at 98 Mott Street, New York, New York, on the employees who were employed there, and reduce to writing any agreement reached as a result of such bargaining.

**WE WILL** pay the employees who were employed at the restaurant their normal wages for a period required by the Decision and Order of the National Labor Relations Board.

**98 Crystal Palace Restaurant Inc. d/b/a Grand  
Harmony Restaurant, Inc.**

**(Employer)**

**Dated** \_\_\_\_\_ **By** \_\_\_\_\_  
**(Representative)** **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlrb.gov](http://www.nlrb.gov).

26 Federal Plaza, Room 3614, New York, NY 10278-0104  
(212) 264-0300, Hours: 8:45 a.m. to 5:15 p.m.

The Administrative Law Judge's decision can be found at [www.nlr.gov/case/02-CA-160359](http://www.nlr.gov/case/02-CA-160359) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (212) 264-0346.